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Issue date: 09Jan2002

CASE NUMBER: 2000-LHC-3088

OWCP NUMBER: 08-115266

IN THE MATTER OF

VINCENT J. LAMPASAS,
Claimant

v.

SHIPPERS STEVEDORING CO.,
Employer

APPEARANCES:

Sidney Ravkind, Esq.
On behalf of Claimant

Michael D. Murphy, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Vincent Lampasas (Claimant) against Shippers Stevedoring Co. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on October 26, 2001, in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced thirteen exhibits which were admitted, including: the deposition testimony of Dr. Vivek Kushwaha; correspondence to and from the Department of Labor concerning rehabilitation services; correspondence concerning the informal conference and recommendation; and a prescription drug list.[1] Employer introduced twenty-five exhibits which were admitted including: Department of Labor filings; Claimant's wage records; wage records of similar employees; the deposition of the Claimant; depositions on written questions to Drs. Michael Kaldis, Hedi Collins, and Bruce Weiner; deposition on written questions to Memorial Hermann Healthcare Hospital, Orthopedic Associates, L.L.P.; Pasadena Clinic, Ferris and Associates Rehabilitation counseling, and Red Oak Pain Management; investigator reports; a vocational report and labor market survey by Wallace Stanfill; certified copies of Claimant's criminal records; and the post-hearing deposition of Dr. Kaldis.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of injury was September 16, 1998;

2. The injury occurred in the course and scope of employment, and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the injury on September 16, 1998;

4. Notice of controversion was filed on July 1, 2000;

5. No informal conference was held;[2]

6. Employer paid temporary total disability from September 16, 1998 to June 1, 2000, and again

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[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX-__, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

[2] Although there was no informal conference, the claims examiner issued a written recommendation on August 2, 2000.

form April 1, 2001, to July 31, 2001, totaling $19,624.75, representing 106.57 weeks.

7. Employer paid some of Claimant's medical benefits.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Credibility;

2. Average weekly wage;

3. Reasonableness and necessity of medical treatment;

4. Nature and extent of injury, and date of maximum medical improvement;

5. Suitable alternative employment; and

6. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Chronology

Prior to working with Employer Claimant held various jobs as a laborer with: ILA Local 24, a longshore unit; Hesco Demolition Company; and Partin & Co. Oilfield Equipment. (EX 6, p. 28; EX 20, p. 4). Additionally, Claimant worked for various contract companies installing insulation and building tanks, and he worked in various chemical plants. (EX 6, p. 28; EX 20, p. 4). Claimant began to work for Employer on June 26, 1998, as a hatch checker earning fifteen to twenty dollars an hour. (Tr. 53; EX 2, p. 1; EX 6, p. 27; EX 15, p. 15). That job required climbing up and down in a cargo ship, finding the proper hold, using a two-way radio to report to the longshoremen what to pick up next, and informing the dock checker what truck and company was needed to pick up the cargo. (Tr. 54). Also, the job entailed moving heavy objects around, such as turnbuckles, lumber, and shackles, and required climbing ladders. (Tr. 54-55; EX 6, p. 27).

On September 16, 1998, Claimant fell approximately thirty to forty feet - landing between piping - while performing his job as a hatch checker. (Tr. 25; EX 1, p. 3; EX 6, p. 32; EX 7, p. 1). Claimant was immediately taken to the hospital where he was diagnosed as having significant fractures in the dorsal lumbar junction of T11 and L1. (CX 4, p. 6; EX 9, p. 13). Conservative treatment with a brace was unsuccessful and its use furthered the deformity of the dorsal lumbar junction. (EX 9, p. 13). On September 19, 1998, Claimant underwent surgery by Dr. Vivek Kushwaha, who performed a fusion from T9 to L2 without any complications. *Id*. On September 24, 1998, Claimant was discharged by Dr. Kushwaha and the doctor gave him a prescription for Vicodin. *Id*. Employer paid Claimant $106.09 per week in compensation starting on September 16, 1998. (EX 1, p. 4).

By October 30, 1998, Dr. Kushwaha noted that Claimant's x-rays looked "fine," and although he required a walker to move short distances, his pain medication requirements were decreasing and his pain levels were improving. (EX 10, p. 1). On December 15, 1998, Dr. Henry, from Orthopaedic Associates, L.L.P., treated Claimant in regards to reports of pain in his small finger of his right hand, left wrist, and reports of excessive sweating on his left side. (EX 13, p. 24). An examination revealed no abnormalities, but Claimant was sensitive to moderate degrees of contact. *Id*. Dr. Henry diagnosed the problem as neuroma and recommended a desensitization program and therapy. *Id*. at 25. On February 19, 1999, Dr. Kushwaha indicated that Claimant's back condition had improved to a point where he could start physical therapy to strengthen the muscles in his back. (EX 10, p. 6). By April 16, 1999, Claimant still had difficulty with bending and lifting, and Dr. Kushwaha sent Claimant back to therapy. (EX 10, p. 7).

On April 27, 1999, Claimant's weekly progress report from Partners Industrial Rehabilitation (Partners), indicated that he had fluctuating pain levels in his lower back ranging from low to moderate in severity. (EX 13, p. 19). After six therapy sessions, Claimant's physical therapist reported that Claimant expressed soreness after each of his hour-and-a-half secessions, but did not suffer from an increase in pain. *Id*. Claimant's physical therapist also related that Claimant's condition was improving. *Id*. When Claimant came for a follow up visit to Dr. Kushwaha on June 4, 1999, however, he still had some residual back pain and Dr. Kushwaha sent Claimant to undergo pain management. (EX 10, p. 7-8). Another x-ray of Claimant's back appeared "fine." (EX 10, p. 8).

On June 30, 1999, Dr. Mohamad, from the Pain Institute of Texas (PIT) noted that Claimant suffered from severe pain radiating from the lumbar area, across his rib cage, to the bilateral lower extremities all the way down to his toes with symptoms of numbness, tingling and weakness. (EX 13, p. 33). Dr. Mohamad assessed Claimant as having post lumbar laminectomy syndrome, bilateral lumbar facet syndrome, bilateral sacroilitis, myofascial pain syndrome, and lumbar radiculopathy. *Id*. at 34.

On August 13, 1999, Claimant continued to suffer pain in his back where the surgery was performed. (EX 10, p. 9). Dr. Kushwaha opined that the pain was mainly related to Claimant's two broken vertebra, the resultant changes to his spine, and because Claimant still had hardware in his back from the first operation. *Id*. Reasoning that ten to fifteen percent of patients have symptoms related to the hardware, on September 16, 1999, Dr. Kushwaha performed surgery to remove the instrumentation in

Claimant's back. (CX 4, p. 9; EX 9, p. 186, 217). By October 14, 1999, Claimant stated that he felt better, a x-ray showed that his spine was stable, and Dr. Kushwaha sent him to therapy to help strengthen his back. (EX 10, p. 9). Meanwhile, Claimant's compensation had increased to $229.87 per week beginning on September 16, 1999. (EX 1, p. 5).

From February 24, 2000, to March 28, 2000, some five months after his surgery, Claimant underwent physical therapy from physicians at TIRR Rehabilitation Centers - Pasadena (TIRR), for a total of ten visits and four cancellations. (EX 10, p. 27). Reports from TIRR indicated that Claimant was not likely compliant in his home exercise program and TIRR discontinued therapy because Claimant was not making any progress towards his goals. *Id*.

On March 6, 2000, Claimant underwent an independent medical evaluation with Dr. Bruce Weiner. (EX 13, p. 7). Dr. Weiner noted that Claimant walked with a cane, and considered Claimant's reports of nerve damage in his arms and statements indicating that he had not improved after removal of his instrumentation. *Id*. Dr. Weiner reported that Claimant's pain was out of proportion with the procedures that were performed and recommended a repeat MRI to see if there was any residual compression in the spinal canal. (EX 13, p. 8). Dr. Weiner further opined that Claimant was capable of sedentary or moderate work, but he could never resume heavy physical labor. *Id*. Following more therapy and conditioning, Dr. Weiner suggested that Claimant undergo a functional capacity exam to negate any reports of secondary gain, after which a better determination could be made concerning the type of work Claimant could do. *Id*.

By March 29, 2000, Claimant reported that his condition was deteriorating, (EX 10, p. 10), but an MRI of his thoracic spine on May 18, 2000, showed no disc herniation or spinal cord nerve impingement. (EX 10, p. 11, 32-34). Dr. Kushwaha recommended further pain management and opined that Claimant would not be able to return to his job as a stevedore. (EX 10, p.11). On June 1, 2000, Employer terminated Claimant's compensation benefits. (ALJX 1).

On June 27, 2000, Dr. Heidi Collins, a pain consultant, noted that Claimant reported a constant, electrical, prickly, stabbing, throbbing, shooting, and aching pain in the shoulders, left wrist, upper, mid, and lower back, hips, buttocks, knees and ankles, along with numbness, weakness, sensitivity, burning, and sweating sensations with muscle spasms. (EX 8, p. 12). Claimant further reported that the pain interrupts his sleep about twenty times per night, and restricts his job, housework, social, recreational and sexual activities. *Id*. Dr. Collins diagnosed low back and lower extremity pain, severe muscle spasms, and depression secondary to his back surgery and recommended that Claimant undergo multi-disciplinary pain management. *Id*. at 13. On a follow-up visit on July 14, 2000, Claimant reported that his pain level was a "5-6." *Id*. at 15. Claimant also indicated that he would like to undergo evaluation for the use of an intrathecal pump, which could decrease his reliance on pain medication and provide him with a more active lifestyle. *Id*. Claimant never received the intrathecal pump because Employer did not authorize the treatment. (Tr. 58).

On July 14-19, 2000, Dr. Kaldis, from the Institute for Spinal Disorders, issued an "independent medical evaluation." (EX 7, p. 3). Based on Claimant's subjective complaints, medical records, and physical examination findings, Dr. Kaldis concluded that Claimant had no neurologic deficit. *Id*. at 8. Dr. Kaldis further determined that Claimant suffered from myofascial pain syndrome, but that Claimant had reached maximum medical improvement with a whole person impairment rating of sixteen percent. *Id*.

On July 24, 2000, Claimant's attorney wrote to the Claims Examiner at the Department of Labor urging that Drs. Weiner and Kaldis' independent medical evaluations not be sent to the informal hearing on the basis that Dr. Kaldis had prior affiliations with the insurance industry and because Dr. Weiner's conclusions were sent to Dr. Kaldis. (CX 12, p. 1). Claims Examiner Conley, however, responded on August 4, 2000, that his office was satisfied it met all the regulatory requirements, it was department policy to send all current medical reports to an independent examiner before his evaluation, and he did not find any reason to schedule a second evaluation. (CX 13, p. 1). Furthermore, examiner Conley recommended that Claimant was entitled to temporary total disability benefits from June 2, 2000 to July 19, 2000, when Dr. Kaldis indicated that Claimant had reached maximum medical improvement and could return to work without restrictions. *Id*.

In December 2000, Claimant obtained employment repossessing automobiles at "Cars R Us." (Tr. 58; EX 6, p. 35). Claimant, however, was unable to effectively perform this job because the driving, bouncing and sitting in the truck aggravated his back. (Tr. 58-59). Over a period of two and one-half months Claimant testified that his cash earnings totaled approximately $1,300.00 to $1,400.00. (Tr. 59). On March 7, 2001, Employer agreed to pay Claimant weekly benefits of $183.90 from April 1, 2001 to July 31, 2001, and agreed to pay for prescriptions for any reasonable and necessary medical treatment. (CX 11).

Subsequently, Claimant underwent pain management therapy at Red Oak Pain Management Center (Red Oak) beginning on May 30, 2001. (EX 10A, p. 1; EX 16, p. 3). There, Claimant stated that his back pain is low in the morning and steadily increases in intensity as the day goes on. (EX 16, p. 4). Claimant also stated that he has trouble completing daily tasks such as yard work, cooking, personal hygiene, and was only able to obtain one to two hours of sleep a night. *Id*. Unhappy with the treatment he received form Red Oak, Claimant called Dr. Kushwaha on July 18, 2001, to ask him if he would continue his prescriptions of sixty Vicodin and twenty-one Soma a week, but, a phone call to Red Oak revealed that Claimant was only receiving twenty-eight Vicodin a week and not sixty. *Id*. Dr. Kushwaha opined that Claimant was not ready to take a reduction in the medication and that was why he wanted to terminate his treatment at Red Oak. (CX 4, p. 12). On July 19, 2001, Red Oak discharged Claimant due to attendance non-compliance because he had attended only two of his daily visits since July 10, 2001. (EX 16, p. 7).

From July to October 2001, Linda Ferris, a rehabilitation specialist with Ferris & Associates, periodically contacted Claimant forwarding job leads and attempting to arrange vocational training. (EX 15, p. 1-31; EX 15A, p. 1-3). On September 7, 2001, Ms. Ferris indicated that Claimant was under

financial hardship because he was not receiving his workers' compensation payments and she was concerned that Claimant's desire to return to work quickly would result in him obtaining a physically inappropriate job. (EX 15, p. 8-9). By October 12, 2001, Ms. Ferris closed Claimant's case due to lack of cooperation and contact with Claimant after Claimant had continually missed appointments, failed to return phone calls, and failed to follow up on prospective job leads. (EX 15A, p. 1-3). On September 5, 2001, Claimant's attorney wrote Ms. Ferris a letter indicating that Claimant would undergo retraining and insinuated that the reason Claimant had not undergone treatment was because Ms. Ferris's letter, dated August 10, 2001, stated that Claimant could only receive rehabilitation services as long as he was entitled to receive workers' compensation benefits, and Claimant was not receiving any benefits after July 31, 2001. (CX 9; CX 10; ALJX 1). On October 4, 2001, Wallace Stanfill, a rehabilitation counselor, issued another vocational assessment of Claimant and a labor marker survey. (EX 20, p. 1).

A few months prior to the formal hearing, Claimant obtained a job as a painter's helper earning eight dollars and hour. (Tr. 61). Claimant was paid in cash and estimated that he earned between nine-hundred and one-thousand dollars a month. (Tr. 62). A typical work week lasted thirty-five to forty hours, but some weeks Claimant only worked for twenty hours. (Tr. 76-77)

Meanwhile, Employer hired two different professional detective agencies to observe Claimant in his daily activities to determine whether Claimant's reports of pain and inability to carry out the functions of daily life were true. (EX 21). Surveillance took place at various times from January 26, 2001 to October 3, 2001. *Id*.

B. Claimant's Testimony

Regarding his job with Employer, Claimant testified that his duties as a checker required him to climb straight up and down inside a cargo ship, crawl around the cargo and tell the longshoremen what to pick up next and to what company the cargo was destined. (Tr. 53-54). The job also entailed moving lumber, cables, turnbuckles and shackles out of the way so that the cargo could be properly checked. (Tr. 54-55). Because of his injury Claimant testified that he was not currently capable of performing this job. Likewise, Claimant stated that he was unable to perform his post-injury job towing vehicles for "Cars R Us" because the driving, bouncing and sitting in the truck aggravated his back, and he could not tolerate driving all night without being able to move around. (Tr. 58-59; EX 6, p. 35). Claimant had worked as a painter's helper for three to four months prior to the hearing, but lost that job when he informed his boss about his physical impairments and pending compensation case. (Tr. 47, 62). Claimant testified that he was able to perform his job as a painter's helper because he did not do physical work, did not carry or tote anything over five to ten pounds, and did not have to bend down to pick up anything. (Tr. 47; EX 6, p. 19-20). Nonetheless, Claimant stated that he was dependent on pain medication, six to ten Vicodin a day, to perform his work. (Tr. 48).

Regarding his physical condition, Claimant testified that he continues to suffer from constant burning and radiating pain twenty-four hours a day. (EX 6, p. 28). At hearing, however, Claimant stated that this radiating pain in his legs was not a twenty-four hour pain, but it "comes and goes." (Tr. 83). Claimant's pain is such that lifting, bending, and even walking hurt. (EX 6, p. 29). If sitting in a chair without a back, Claimant estimated that he could only sit for about twenty minutes before he would have to stand back up. (EX 6, p. 36). Claimant was unsure if he had ever picked up anything over fifteen pounds since his accident, but he stated that picking up anything hurts his back. (EX 6, p. 44). Claimant later conceded that he probably had lifted a box of papers weighing about thirty pounds. (EX 6, p. 44-45). When confronted with Mr. Stanfill's report indicating that Claimant could not lift anything more than ten pounds, Claimant disagreed with that statement but indicated that he experienced pain every time he lifted more than ten pounds. (EX 6, p. 45). On a daily basis, however, Claimant testified that the amount he can lift is dependent on the weather, and on a good day he could lift thirty pounds, albeit in pain. (EX 6, p. 46).

Claimant also stated that the symptoms of his injury caused him to use a hand rail when ascending or descending stairs, and that the heaviest thing that he has carried up a flight of stairs was laundry. (EX 6, p. 20). Claimant only bends over by bending at the knees. (EX 6, p. 21). At the hearing, Employer cross-examined Claimant with video surveillance depicting Claimant carrying a 2.5 gallon water container weighing twenty pounds, carrying groceries, picking up a bag of charcoal in one hand with a gallon of milk in the other, carrying four bags of groceries up stairs, then standing on one leg while kicking at the door, and loading a guitar and an amplifier into a car. (Tr. 84-90). Claimant testified that he did undertake those activities, but they caused him pain, the bags of groceries only contained light weight items, like potato chips, and explained that the amplifier, which ordinarily weighs forty pounds, was much lighter because it was only the "electronic part" - weighing about twenty pounds - and the guitar case weighed about eight pounds. (Tr. 85-91). More video surveillance was taken of Claimant at work where he was depicted carrying one-gallon paint cans, bending, picking items up, pulling a forty pound compressor on wheels with an air hose in the other arm, and throwing scraps of lumber into a receptacle. (Tr. 93-95). Claimant responded by stating that he only had to pull the compressor and the hose was light weight. (Tr. 94-95). Likewise, Claimant testified that the videotape was conveniently edited to remove segments where the pain of working caused him to bend over and sit down. (Tr. 94).

Regarding his non-compliance with physical therapy and pain management, Claimant testified that he quit attending his meetings at Red Oak because it was a long drive for him and he showed up on three or four occasions but was turned back because Employer had not agreed to pay for his treatment. (Tr. 99, 105). Another reason for his attendance non-compliance was that he suffered from severe financial stress, and he only wanted medication so that he could go back to work as soon as possible. (Tr. 108). Furthermore, he never saw the physicians who wrote the report discharging him from Red Oak. *Id*.

Concerning attempts at vocational rehabilitation by the Department of Labor, Claimant testified that he did not follow up on any of the leads that Ms. Ferris sent to him because he was currently working as a painter's helper and did not feel that he could leave that job to search for a new one. (Tr. 76, EX 6, p. 41). Likewise, Claimant refused to undergo vocational training with the State because it would take nearly

six weeks before he would receive a maintenance check, he needed money before that time, and he had just started a job as a painter's helper. (Tr. 66-67). When he told Ms. Ferris of his cash-paid job as a painter's helper, Ms. Ferris' reaction was merely to say "be careful." (EX 6, p. 37). Additionally, Claimant stated that he was compliant with Ms. Ferris' attempts to assist him, he tried on several occasions to return her phone calls, and he only acknowledged receiving one letter from her. (Tr. 77).

Eventually, Claimant testified that he would like to continue his job as a longshoreman, but he understands that the amount of prescription drugs he takes must be modified substantially or even eliminated before going back to work as he cannot have anything impairing his thoughts. (Tr. 65, EX 6, p. 42). Claimant acknowledged that no union or stevedore company had set this limitation on employment, but stated that he was pretty sure that "was how it went." (Tr. 65-66).

C. Testimony of Employer's Witnesses

Testimony of Wallace Stanfill

Mr. Stanfill, a rehabilitation counselor, testified on behalf of Employer concerning suitable alternative employment for Claimant. If an injured longshoreman contacted Mr. Stanfill, he testified that he would seek employment that offered stability and a health care package, and would adamantly advise against taking a cash basis job such as Claimant's position as a painter's helper. (Tr. 120). Claimant's former longshore employment as a clerk/checker is categorized as a light position in the Dictionary of Occupational Titles, meaning that such a position requires a maximum lifting of twenty pounds and lifting of ten pounds frequently, with a worker on his feet for six hours in an eight hour day. (Tr. 123-24).

After reviewing Dr. Kushwaha's deposition, Mr. Stanfill determined that Claimant could do work requiring a medium level of exertion, requiring maximum lifting of fifty pounds and frequent lifting of twenty-five pounds. (Tr. 124-25). After reviewing the surveillance video of Claimant, Mr. Stanfill indicated that the level of exertion he observed would fall into the light level and was approaching medium level type work. (Tr. 131). Based on the jobs that Ms. Ferris had recommended prior to terminating her involvement on October 12, 2001, Mr. Stanfill determined that the jobs she recommended also fell into the light to medium range. (Tr. 134).

Mr. Stanfill further stated that Claimant has a higher intelligence than the average longshoreman and nothing prevented him from resuming his job as a clerk/checker. (Tr. 125 & 127). Further, over the past twelve months Mr. Stanfill identified 310 positions as a shipping/receiving clerk, falling into the medium level of exertion range, that paid an average of $10.01 per hour. (Tr. 129). On cross-examination, however, Mr. Stanfill admitted that it would not be advisable to do longshore work while using prescription opiates, and regulations prohibit such use. (Tr. 136). Mr. Stanfill did not inquire whether the other positions he identified: shipping and receiving clerk, tool equipment attendant, inventory clerk, grounds keeper, cleaner, mail clerk, and assembler had restrictions on the use of prescription medication. (Tr. 141). During his

evaluations with Ms. Ferris and Mr. Stanfill, however, Claimant did not list the fact that he was on prescription opiates as a problem that would interfere with his work. (Tr. 147-48).

D. Claimant's Exhibits

1. Deposition of Dr. Kushwaha

Claimant deposed Dr. Kushwaha on October 17, 2001 concerning his treatment of Claimant and the recovery process. (CX 4). Dr. Kushwaha first saw Claimant on the day of his injury, diagnosing him with two unstable fractures at T11 and L1. *Id*. at 6. Conservative treatment with a brace failed and Dr. Kushwaha performed a T9 to L2 posterior spinal fusion with instrumentation. *Id*. at 5. Surgery occurred in the thoracal lumbar junction, which is where the spine experiences the most stress in terms of lifting and bending. *Id*. at 27, 51-52.

About a year after Claimant's lumbar fusion, Dr. Kushwaha reasoned that removal of the instrumentation from Claimant's back may help to reduce his pain level. *Id*. at 9. Dr. Kushwaha stated that he had no reason to believe that Claimant was fainting or faking symptoms of pain, and related the origin of the pain to Claimant's workplace injury. *Id*. After his two surgeries, Claimant has an abnormal back configuration, and suffers from kyphosis - a humping of the back - created when the spine tries to bend the back completely forward. *Id*. at 19. Likewise, the vertebrae themselves have distorted due to kyphotic angulation. *Id*. at 20. From a surgical standpoint, however, there was nothing more he could do for Claimant after reviewing an MRI of Claimant's spine on August 11, 2000, and that was the date Dr. Kushwaha assigned for maximum medical improvement. *Id*. at 8, 23, 46. In reaching this conclusion, Dr. Kushwaha concluded that there was no lingering neurological deficit, disc herniation at any level, radiculopathy, organic dysfunction of the shoulders, dysfunction in the lumbosacral area, knee orthopedic dysfunction, or cervical nerve compression. *Id*. at 47-48. No organic deficit would prevent Claimant from heel-toe walking normally. *Id*. at 48.

On April 4, 2001, Claimant reported to Dr. Kushwaha that he still suffered from pain and Dr. Kushwaha consulted Claimant on the use of a morphine pump and a spinal cord stimulator, however, Claimant indicated that he was not willing to pursue those options at that time. *Id*. at 10. Dr. Kushwaha further testified that he was not the most qualified person to make the determination if a morphine pump was the best course of action for Claimant, and that was why he referred Claimant to pain specialists. *Id*. at 37. Reasoning that Claimant was on a steady dose of medication, Dr. Kushwaha thought that Claimant's best course of treatment would be pain management and a slow weaning from his narcotic prescriptions. *Id*. at 10. Despite the fact that Claimant could function, Dr. Kushwaha did not release Claimant for work. *Id*. at 11. Apart from a phone call in July 2001, the April 4, 2001 visit was the last time that Dr. Kushwaha met with Claimant. *Id*. at 12.

In regards to Claimant's physical capabilities, Dr. Kushwaha stated that lifting would not likely destabilize Claimant's spine, but stated that it was not a good idea to engage in repetitive bending and lifting over twenty pounds. *Id*. at 13-14. Accordingly, Claimant's job as a longshoreman was not an appropriate vocation. *Id*. at 14. Although not totally disabled, Claimant does require pain medication that prevents him from concentrating. *Id*. at 14. At his deposition, Dr. Kushwaha did approve Claimant to do sedentary work, but stated that he had not released Claimant to return to work and that Claimant needed further care and treatment from an orthopedic standpoint. *Id*. at 6-7, 14. Dr. Kushwaha also stated that Claimant's medical condition had reached a plateau some time ago (from October 17, 2001), he had not gotten any better, and Dr. Kushwaha's only actions were to monitor Claimant's pain medication to improve his functioning level. *Id*. at 23-24.

After viewing Employer's videotape surveillance highlights, (EX 24), Dr. Kushwaha stated that Claimants kyphosis was visible, but that Claimant had gotten in a little better shape by losing some weight. *Id*. at 28, 31-32. In response to Claimant's activities in carrying groceries, loading an amplifier into his car, bending over to the ground, wheeling an air compressor, and throwing scraps of lumber, all without visible signs of pain, Dr. Kushwaha stated that such activities were not surprising. *Id*. at 32. Dr. Kushwaha opined that the activities depicted on the video were less strenuous than Claimant's job on the waterfront, which he envisioned as consisting of more repetitive bending and heavy lifting. *Id*. at 33. Further, Dr. Kushwaha stated that he thought Claimant could lift forty or fifty pounds, but such lifting was not good for him on a repetitive basis which he defined as many times per hour, eight hours a day. *Id*. 34-35. The video, however, was consistent with Dr. Kushwaha's opinion of Claimant's physical capabilities. *Id*. at 36.

On July 18, 2001, Claimant called Dr. Kushwaha's office to ask that Dr. Kushwaha continue his prescription medication because Claimant wanted to terminate his relationship with Red Oak. *Id*. Dr. Kushwaha did not know if Claimant was dissatisfied with the program at Red Oak or was merely unhappy to suffer a reduction in his pain medications. *Id*. at 13, 41.

E. Employer's Exhibits

1. Medical Records from Partners

On January 4, 1999, Claimant was initially evaluated at Partners by Dr. Henry for pain in his right hand, left wrist, and back. (EX 13, p. 11). On April 27, 1999, a physician at Partners issued a report indicating that Claimant underwent six therapy sessions, where Claimant stated that his pain was low to moderate. *Id*. at 19. Claimant completed each physical therapy secession with some soreness, but did not experience an increased pain level. *Id*. Overall, Claimant's condition was improving and Claimant exhibited signs of relief and increased activity. *Id*.

2. TIRR Therapy Progress Notes

Claimant underwent treatment at TIRR Rehabilitation Center from February 24, 2000 to March 28, 2000 for physical therapy in the aftermath of the removal of Claimants hardware in September 1999. (EX 10, p. 27). The goals that TIRR set for Claimant over an eight week period were: increase functional mobility of the thoracic and lumbar regions; educate Claimant on body mechanics, safety and care; decrease pain intensity; increase postural awareness; reduce soft tissue restriction in both hamstrings and calf muscles; and increase functional muscle strength of the spinal stabilizers and lower extremities. *Id*. at 29. TIRR reported on May 15, 2000, that Claimant did not make any progress toward his goals because he continued to have severe back pain, troubled sleep, and no decrease in pain intensity. *Id*. at 27. Claimant's participation was rated as "fair, secondary to cancellations," and TIRR discontinued therapy due to lack of progression. *Id*.

3. Medical Report of Dr. Mohamad

Claimant underwent physical therapy with Dr. Mohamad at PIT after a referral from Dr. Kushwaha. (EX 13, p. 29). Dr. Mohamad issued a report, dated June 30, 1999, where he related that Claimant continued to suffer from severe pain radiating from the lumbar region to the bilateral lower extremities down to the toes with numbness, tingling and weakness. *Id*. at 33. Dr. Mohamad ordered a CT scan of Claimant's lumbar spine but Claimant's insurer refused to approve the procedure. *Id*. Dr. Mohamad assessed post-lumbar laminectomy syndrome, bilateral lumbar facet syndrome, bilateral sacroliitis, myofascial pain syndrome, and lumbar radiculopathy. *Id*. at 33-34. Dr. Mohammad recommended that Claimant continue physical therapy to prevent further deterioration. *Id*. at 34. Dr. Mohammad also stated that injection therapy may be an option after he reviewed the results of the CT scan, and he discontinued use of Flexeril and provided Claimant a prescription for Soma and Loratab. *Id*. Dr. Mohammad also fitted Claimant for an LSO jacket in an attempt to provide added lumbar support and prevent instability of the lumbar spine. *Id*.

4. Medical Report of Dr. Weiner

On March 6, 2000, Dr. Weiner issued an independent medical evaluation. (EX 13, p. 7). In his intake sheet, Claimant indicated that he took three Vicodin morning and night, two Soma twice a day, and Amatripline every one and a while. *Id*. at 3. Claimant also stated that the pain was most intense in his back, with irritating pains in his knees and ankles. *Id*. at 2. Dr. Weiner also noted that Claimant walked with a cane, did not feel any better after removal of his hardware, and had nerve damage in both arms. *Id*. at 7. A physical exam, however, showed normal neurological, motor, reflex, and sensory reactions. Claimant had moderate spasms in his back, but could flex to seventy degrees and could rotate to thirty degrees in each direction. *Id*.

Dr. Weiner's impression was that Claimant suffered from "post-operative spinal fusion for compression fracture of vertebra with residual pain." *Id*. at 8. Although Claimant's reports of pain

appeared to be out of proportion with the surgeries performed, some residual pain was inevitable, and Dr. Weiner recommended a repeat MRI to see if there is any residual compression in the spinal canal. *Id*. Dr. Weiner did not feel that Claimant could ever return to heavy physical labor, but opined that Claimant could do moderate work within a few months after some more therapy and conditioning. *Id*. Dr. Weiner also recommended that Claimant undergo a functional capacity exam to make sure no secondary gain was going on, after which a more accurate prognosis could be made about Claimant's physical capabilities. *Id*.

5. Medical Records of Dr. Collins

On June 26, 2000, Dr. Collins, a pain consultant, examined Claimant on the referral of Dr. Kushwaha. (EX 8, p. 12). Claimant reported a constant, electrical, prickly, stabbing, throbbing, shooting, and aching pain in the shoulders, left wrist, upper, mid, and lower back, hips, buttocks, knees and ankles, along with numbness, weakness, sensitivity, burning, and sweating sensations with muscle spasms. *Id*. Claimant further reported that the pain interrupts his sleep about twenty times per night, and restricts his job, housework, social, recreational, and sexual activities. *Id*. On the date of his visit, Claimant reported that he took a maximum of nine Vicodin and six Soma within a twenty-four hour period. *Id*. at 6. On June 27, 2000, Dr. Collins issued a report diagnosing low back and lower extremity pain, severe muscle spasms, and depression secondary to his back surgery. *Id*. at 13. Dr. Collins recommended that Claimant undergo multi-disciplinary pain management and that his medications be maximized to best benefit from the program. *Id*. On a follow-up visit on July 14, 2001, Claimant reported that his pain level was a "5-6." *Id*. at 15. Claimant also indicated that he would like to undergo evaluation in a trial of an intrathecal pump, which could decrease his reliance on pain medication and provide him with a more active lifestyle. *Id*.

6. Medical Reports of Dr. Kaldis

Dr. Kaldis issued an independent medical evaluation of Claimant on July 14-19, 2000. (EX 7, p. 1). At that time Claimant was currently taking the medications of Vicodin, Soma, Ambien and Amytripline, and complained of lower back and leg pain. *Id*. Claimant stated that he had constant radiating pain in both legs, mainly in his hips, knees, and ankles, that started about one month after his workplace accident. *Id*. Dr. Kaldis also noted a history of constant numbness in the back and in the first and second toes with constant weakness. *Id*. Claimant's pain was aggravated by lifting, bending, stooping, standing, walking, sitting, climbing stairs, sneezing, and riding in a automobile. *Id*. Dr. Kaldis also noted that Claimant had not responded well to physical therapy which Claimant had attended for five to six weeks, three times per week. *Id*.

A physical exam revealed that Claimant could heel-toe walk within normal limits. *Id*. at 3. An MRI indicated that Claimant suffered from post-traumatic kyphosis at the level of his fractures, but no evidence suggested disc herniation or neurologic deficit. *Id*. at 3, 8. Dr. Kaldis opined that Claimant had appropriate care and extensive post-operative rehabilitation. *Id*. at 8. As the only remaining problem was myofascial pain syndrome, Dr. Kaldis opined that Claimant had reached maximum medical improvement

with a whole person impairment rating of sixteen percent. *Id*. Dr. Kaldis did not see any reason why Claimant could not return to full duty without work restrictions. *Id*.

7. Deposition of Dr. Kaldis

Employer noticed the deposition of Dr. Kaldis, post-hearing, on November 12, 2001. (EX 25, p. 1). Interpreting the results of his physical exam, Dr. Kaldis did not detect any evidence of weakness or restriction in range of motion in the lower extremities, indicating that Claimant had no spinal cord or nerve root damage. *Id*. at 13-14. Claimant's five level fusion, however, would put additional stress at the ends of the fused section and, if a person is engaged in manual labor difficulty would likely occur at those two points. *Id*. at 19-20.

Dr. Kaldis stated that he approved Claimant to go back to work at full duty without restrictions because he understood that Claimant just checked cargo and did not see how Claimant's injury would affect that job. *Id*. at 16. On cross examination, Dr. Kaldis admitted that he did not investigate the job requirements of a longshore clerk/checker. *Id*. at 20. While climbing ladders would not be appropriate considering Claimant's injury, he could work overhead. *Id*. at 20-21. Dr. Kaldis could see no physical or objective limitation on lifting based on Claimant's medical records, but he stated that Claimant likely experienced pain as a result of his injury and that pain was the biggest impediment to lifting. *Id*. at 21-22.

With regard to the recommended pain treatment by Dr. Collins, Dr. Kaldis agreed that it was necessary that Claimant end his dependency on opiate narcotics. *Id*. at 24. Based on Claimant's consumption of opiate medication, Dr. Kaldis opined that Claimant should not work around moving objects because the narcotic would affect his judgment and reflexes making him a liability to himself and others. *Id*. at 24-25. After reviewing additional medical records, however, Dr. Kaldis would not endorse Dr. Collins' recommendation for an intrathecal pump because it is a last resort for treatment of chronic pain. *Id*. at 29. Such a use, at this time, would not be proper considering Claimant's non-compliance with the pain management program at Red Oak and his apparent ability to function without the pump on a daily basis. *Id*. at 30.

8. Rehabilitation Counseling Records from Ferris & Associates

Notes from Claimant's file at Ferris & Associates indicate that Claimant first met with a rehabilitation counselor on July 10, 2001. (EX 15, p. 1). A Career Assessment Inventory was completed on July, 20, 2001, *id*. at 18, and by August 9, 2001, Ms. Ferris noted that Claimant was no longer receiving workers' compensation, had stopped his pain program, and was so anxious to return to work that he was not considering physically appropriate jobs. *Id*. at 16. Ms. Ferris listed "continuing feasibility for success" as "questionable" because of Claimant's "desperation" to find work quickly. *Id*.

On August 27, 2001, Ms. Ferris wrote Claimant a letter relating that she had attempted to contact him on several occasions and asked that he call her to schedule a time to meet. *Id*. at 13. By letter dated

August 31, 2001, Ms Ferris related that Claimant failed to show up at their after hours meeting. *Id*. at 11. Contact was eventually made, however, and Ms. Ferris forwarded job leads to Claimant on September 11, 2001. *Id*. at 2-6. Appropriate jobs that Ms. Ferris identified were: floor covering estimator, customer service representative, sales representative, shuttle driver, delivery driver, and gate attendant. *Id*. at 2-5. By October 12, 2001, Ms. Ferris closed Claimant's file due to lack of cooperation and contact with Claimant. (EX 15A, p. 2).

9. Medical Records From Red Oak

On July 9, 2001, Claimant began what was intended as a four week, twenty day, pain management program at Red Oak. (EX 16, p. 1). Claimant's only other therapy days, however, occurred on July 16 & 17, 2001. *Id*. at 2, 10. Dr. Kushwaha had referred Claimant to Red Oak to treat his lower back pain which radiated in to his legs. *Id*. at 3. Claimant reported that his pain level was low in the morning but by the afternoon he rated his pain as severe, and hot packs, cold packs, and a TENS unit did not provide any relief. *Id*. at 4. Claimant further stated that his pain prevents him from completing normal daily tasks such as yard work, cooking, cleaning, personal hygiene, and interrupts his sleep so that he only receives one to two hours a night. *Id*.

On July 19, 2001, Red Oak discharged Claimant because of attendance non-compliance. *Id*. at 7. At the time of discharge, Red Oak noted that Claimant's prescription medication was reduced to one Vicodin every four to six hours, and one Soma every six hours. *Id*. When speaking to a Red Oak physician about his medication, the physician informed Claimant that he would not receive any medication management unless Claimant attended his daily chronic pain management program. *Id*.

10. Department of Labor Rehabilitation Correspondence

On July 26, 2001, Cecile Johnson, a vocational rehabilitation specialist with the Department of Labor, wrote a letter to Claimant informing him that he may be eligible for vocational rehabilitation benefits. (EX 18, p. 1). Ms. Johnson sent a second notice on August 10, 2001. *Id*. at 2. Both letters stated that such vocational rehabilitation services would only be available if Claimant was receiving or entitled to receive workers' compensation benefits. *Id*. at 1-2. On August 30, 2001, the Department of Labor closed Claimant's rehabilitation file because Claimant did not respond to the two letters sent to him regarding their services. (EX 19, p. 2). On September 5, 2001, Claimant's attorney wrote Ms. Johnson offering to send Claimant to receive rehabilitation services should the Department of Labor determine that Claimant is entitled to receive compensation benefits. (CX 10, p. 1).

11. Claimant's Criminal Record

On November 16, 1992, the Harris County Criminal Court adjudicated Claimant guilty of having five to fifty pounds of marijuana, a first degree felony. (EX 24, p. 3). For this offense Claimant received a ten year sentence. *Id*. Claimant was not incarcerated in 1992, however, on March 23, 1993, Claimant

violated the terms of his parole because he "failed to avoid injurious or vicious habits, failed to secure or maintain employment, failed to pay suspension fee, failed to pay fine and court cost, and failed to participate in the Harris County Community Supervision and Corrections Department Tier II Program." *Id*. at 5. For this parole violation Claimant was sentenced to the Texas Department of Corrections for three years beginning on August 22, 1995 with eighty-one days credited toward his sentence. *Id*. at 3. The Texas Department of Corrections released Claimant early, but on October 21, 1997, Claimant pled nolo contendere to possession of zero to two ounces of marijuana for which he received a fifteen day sentence. *Id*. On September 20, 2001, charges were filed against Claimant for a first offense DWI, and that case was still pending on the day of the hearing. *Id*.

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he has not reached maximum medical improvement because Employer refused to authorize the insertion of an intrathecal pump as recommended by Dr. Collins. Admitting that he is not totally disabled, Claimant contends that the amount of prescription medication he takes each day and severe back pain prohibits him from obtaining employment. Additionally, Claimant contends that he is entitled to a greater average weekly wage, and argues that Dr. Kaldis does not meet the criteria for an Department of Labor Independent Medical Examiner.

Employer contends that Claimant is not a credible witness, and Claimant's average weekly wage should be determined by taking eleven months of known earnings and annualizing it over a fifty-two week period. Employer further argues that further medical treatment as recommended by Dr. Collins is not reasonable nor necessary, and asserts that Claimant had reached maximum medical improvement no later than August 2000. Also, Employer contends that, while Claimant cannot return to his former employment, Claimant is able to preform jobs that require a moderate level of effort, and asserts that it is entitled to a credit for all "cash" earnings of Claimant while he was receiving compensation payments.

A. Credibility

(1) Claimant

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh. denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem*

Steel Corp., 620 F.2d 60, 64-65 (5th Cir. 1980); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Here, based on the record as a whole, and my observation of Claimant's demeanor, I do not find that Claimant is a credible witness. I find that Claimant engaged in symptom magnification and gave inconsistent statements regarding the pain associated with his injury. First, at the time of his deposition on October 10, 2001, Claimant stated that he suffered from constant burning and radiating pain twenty-four hours a day. (EX 6, p. 28). At hearing, on October 27, 2001, however, Claimant stated that the radiating pain in his legs was not a twenty-four hour pain, but that the radiating pain "comes and goes." (Tr. 83). Second, Claimant testified that lifting, bending and walking hurt, (EX 6, p. 29), yet video surveillance depicted Claimant doing those activities without any noticeable pain. (EX 22). Third, at his deposition Claimant stated that he could only sit in a chair that did not have a back for about twenty minutes before he would have to stand up, (EX 6, p. 36), but I detected no such symptoms on the day of the hearing. Fourth, Claimant related to Mr. Stanfill, a vocational expert, that he could not lift more than ten pounds. (EX 6, p. 45). At his deposition Claimant recanted his statement and qualified his remarks by stating that he cannot lift anything without experiencing pain. (EX 6, p. 44-47). Fifth, Claimant stated that the heaviest thing he had carried was about thirty pounds, using both hands, and Employer's video surveillance exposed Claimant carrying a twenty pound jug of water in one hand, carrying groceries, an amplifier, and charcoal all without noticeable pain.[3] (EX 6, p. 46; EX 22). Furthermore, Claimant stated that he did not bend or tote anything over five pounds as a painter's helper - statements directly contradicted by video surveillance. (Tr. 47; EX 6, p.35; EX 22). Accordingly, I view Claimant's reports concerning his impairments as suspect and entitle his subjective complaints to less weight.

(2) Qualification of Dr. Kaldis as an Independent Medical Examiner

Under Section 7(e) of the Act, the Department of Labor may choose an independent medical examiner to review the relevant medical data, meet with the claimant, and issue a report concerning a claimant's physical impairments. 33 U.S.C. § 907(e) (2001); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380, 387 (1990)(stating that an independent medical examiner provides "the fact finder a means to obtain a reliable, independent evaluation of a claimant's medical condition."). A party dissatisfied with such a report may request re-examination by a different physician employed or selected by the Department of Labor. 33 U.S.C. § 907(e) (2001). Under Section 7(i), an independent medical examiner may not be a physician who is employed, or has been employed within the last two years, by any insurance carrier where the physician has accepted or participated in a fee relating to a workmens'

[3] Employer also sought to discredit Claimant on the grounds that he exaggerated his use of Vicodin at six to ten per day. (Tr. 48). Pharmacy records indicate, however, that from January 11, 2001, to October 24, 2001, Claimant received prescriptions for 1,768 Vicodin (Hyrocodone) tablets for a period spanning 286 days. (CX 17). Thus, on average, Claimant took 6.18 Vicodin tablets per day.

compensation claim unless the parties agree otherwise. 33 U.S.C. § 907(i) (2001); 20 C.F.R. § 702.411 (2001).

Here, the Department of Labor's independent medical examiner, Dr. Kaldis has a significant background in insurance litigation:

> Q . . . . Did I understand you to say . . . that you routinely do evaluations for insurance companies? Is that part of your practice?
>
> A Independent medical exams. They come from different places. But, yes, I routinely see independent medical exams because of my subspeciality in spinal - -
>
> Q . . . . Could you tell me some of the companies that you have done evaluations for? Aetna - -
>
> A . . . [W]ell, I'm sure I've done some Aetna. Travelers, Cigna.
>
> Q Within the last two years would that - -
>
> A. Probably. GAB. . . . Other insurance companies. Those are the ones that come to mind right off the top of my head.

(EX 25, p. 18-19).

Claimant's attorney also asserts that he never agreed to the selection of Dr. Kaldis as an independent medical examiner. (CX 12-14). Claimant's attorney requested that another independent examination be performed pursuant to Section 7(e), (CX 12), but claims examiner Conley refused to arrange for a second Department of Labor independent medical examination stating that he was confident that Dr. Kaldis met all the regulatory requirements. (CX 13). Accordingly, Dr. Kaldis' report is entitled to less probative value than normally associated with an independent medical exam because, by his own testimony, Dr. Kaldis was employed by insurance carriers within the last two years in violation of Section 7(i), and Claimant never acquiesced in the selection of Dr. Kaldis.

B. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir.

1991). Consequently, the initial determination I must make is under which of the alternatives to proceed.

(1) Section 10(a)

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Jurisprudence interpreting Section 10(a) establishes the meaning of "substantially the whole year." *See Lozupone v. Stephano Lozupone & Sons*, 12 BRBS 148, 155 (1979)(finding that 33 weeks was not substantially the whole year); *Stand v. Hansen Seaway Service, Ltd.*, 9 BRBS 847, 850 (1979)(finding that 36 weeks was not substantially the whole year); *Mallory v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 516, 519 (1999)(ALJ)(finding that a person who works less than half the preceding year cannot be said to have worked "substantially the whole year"). *Cf. Eleaver v. General Dynamics Corp.*, 7 BRBS 75, 79 (1977)(finding 28 weeks of employment sufficient because claimant's work was regular and continuous); *Amon v. Ceres Marine Terminal*, 2001-LHC-0295, n.4; 2001 WL 1451099 *4 (DOL Ben. Rev. Bd. 2001)(ALJ)(indicating that 28.43 weeks was substantially the whole year considering claimant's work was "continuous and uninterrupted"). Here, Claimant only worked for Employer from June 26, 1998, to September 16, 1998, a period of 11.57 weeks, and this time frame cannot be characterized as substantially the whole of the year making a Section 10(a) calculation inappropriate.

(2) Section 10(b)

Where Section 10(a) is inapplicable, the courts have found that application of Section 10(b) must be explored prior to the application of Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 12 BRBS 806 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(b) applies to an injured employee who was working in permanent or continuous employment at the time of injury, but did not work "substantially the whole year" prior to his injury within the meaning of Section 10(a). *Empire United Stevedores*, 936 F.2d at 821; *Duncan*, 24 BRBS at 153; *Lozupone*, 12 BRBS at 153. Section 10(b) uses the wages of other workers in the same employment situation as the injured party and directs that the average weekly wage should be based on the wages of an employee of the same class, who worked substantially the whole year preceding the injury, in the same or similar employment, in the same or neighboring place. 33 U.S.C. § 910(b). However, where the wages of the comparable employee do not fairly represent the wage earning capacity of the injured claimant, Section 10(b) should not be applied. *Palacios*, 633 F.2d at 842; *Hayes v. P & M Crane Co.*, 23 BRBS 389, 393 (1990), *vac'd in part on other grounds*, 24 BRBS 116 (CRT) (5th Cir. 1991); *Lozupone*, 12 BRBS at 153.

Here, Employer submitted the wage records of five similarly situated Employees, but the wage records reflect the time period after Claimant's injury and not wage records from the "immediately

preceding year" as required by Section 10(b). 33 U.S.C. § 910(b) (2001). Accordingly, under the express language of Section 10(b), a wage calculation under this provision is not appropriate.

(3) Section 10(c)

If neither of the previously discussed sections can be applied "reasonably and fairly", then determination of Claimant's average annual earnings pursuant to Section 10(c) is appropriate. *Gatlin*, 936 F.2d at 821; *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986); *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

33 U.S.C. § 910(c).

The judge has broad discretion in determining the annual earning capacity under Section 10(c), *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 105 (1991), *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991), keeping in mind that the prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Cummins v. Todd Shipyards*, BRBS 283, 285 (1980). In this context, earning capacity is the amount of earnings a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); *Walker v. Washington Metro. Area Transit Authority*, 793 F.2d 319 (D.C. Cir. 1986).

When making the calculation of Claimant's annual earning capacity under Section 10(c), the amount actually earned by Claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288 (1979), *aff'g in relevant part*, 5 BRBS 290 (1977). Therefore, the amount Claimant actually earned in the year prior to his accident is a factor, but is not the over-riding concern, in calculating wages under Section 10(c). *Gatlin*, 936 F.2d at 823. The Board will affirm a determination of average weekly wage under Section 10(c) if the amount represents a reasonable estimate of Claimant's earning capacity at the time of the injury. *Richardson v. Safeway Stores, Inc.*, 14 BRBS 855 (1982).

To rely only on the fifty-two week period prior to Claimant's injury would unfairly misrepresent his wage earning capacity because Claimant received a change in earning capacity when he obtained a job with Employer on June 26, 1998. *See Le v. Sioux City and New Orleans Terminal Co.*, 18 BRBS 175, 177 (1986)(finding that wages earned prior to a raise did not reflect earning capacity because pre-raise

wages reflect earlier work at a lower rate of pay); *Lozupone v. Lozupone & Sons*, 14 BRBS 462, 464-65 (1981)(stating that a determination of wage earning capacity must include recent pay increases and a reasonable method of calculating wage earning capacity is to multiply the wage at the time of the injury by the number of hours normally available to the claimant). Accordingly, as Claimant experienced a change in earning capacity after beginning work for Employer, I find that it is not appropriate to annualize Claimant's earnings for the fifty-two weeks preceding his workplace injury[4] because to do so would artificially decrease his wage earning capacity at the time of his injury.

Claimant began working for Employer on June 26, 1997. (EX 2, p. 1). Claimant's last day of work was September 16, 1998, when he left work at 10:56 a.m. because of his workplace injury. (EX 1, p. 3; EX 2, p. 1) During the eighty-two day period between June 26, and September 16, 1998, Claimant worked a total of forty days, or 434.50 hours, earning $5,516.96. (EX 2, p. 1). Claimant asserts, that his average weekly wage is nearly $500.00 per week. (Tr. 34). Employer, however, asserts that under Section 10(c), Claimant's total wages are $5,516.96 over eleven months, or $6,018.50 if annualized, reflecting an average weekly wage of $115.74.

I find that Employer's approach does not fairly apportion Claimant's average weekly wage based on the record and the jurisprudence. Considering the record, I find that the most accurate way to calculate Claimant's average weekly wage to reflect his true earning capacity under Section 10(c) is to: determine the time between Claimant's starting date and his workplace injury; add the total amount of wages earned in that period;[5] extrapolate that number onto a weekly time frame; and make an adjustment for the amount of work reasonably available for Claimant at the waterfront.

In making a wage calculation I do not include the day of Claimant's injury because Claimant's employment on that day was artificially cut short by his workplace injury. Accordingly, Claimant worked thirty-nine out of eighty-one days, or 430.50 hours, earning $5,471.51. (EX 2, p. 1). Eighty-one days is

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[4] The record indicates that Claimant intended to maintain long term employment as a longshoreman. Claimant's father is a senior waterfront worker. (Tr. 113). Claimant testified that decided to go to work at the docks because his family had worked there all his life and that occupation was what Claimant decided to undertake because "he had to get his life together," and stated that he "liked" working on the water. (Tr. 53 & 110). Contrary to Employer's assertion that Claimant became disillusioned with working as a longshoreman - as reflected by a decline in the number of eight hour days worked - Claimant testified that the reason his wage records only reflect five full days of work before his injury in September was because he had low seniority and sometime workers could go for a week without work. (Tr. 110-111). Also, in his deposition, Claimant stated that he wanted to return to work at the docks once he was able. (EX 6, p. 52).

[5] This calculation does not include accrued holiday and vacation pay because there is an insufficient basis in the record for making such a determination. *See Sproull*, 25 BRBS at 105-08.

the equivalent of 11.57 weeks, thus Claimant's average weekly wage is $472.90 ($5,471.51 divided by 11.57 weeks).

I do not find, however, that the eighty-two day time span that Claimant worked at the docks accurately reflects periods of work and periods of non-work, as well as availability of overtime, based on a person having less than one year of seniority. A review of the wage records of similar situated employees, taken subsequent to Claimant's injury, reveals that the above calculation of $472.90 per week is too high. Employers wage records indicate the following:

Employee	Total Earnings	Weeks	Days Worked	Average Days Per Week	Average Weekly Wage
Gibson	$ 58,557.58	157	390	2.48	$ 372.98
Lafleur	$ 65,653.49	157	460	2.93	$ 418.18
Jory	$ 53,448.35	157	376	2.39	$ 340.44
York	$ 50,586.05	157	341	2.17	$ 322.20
Espinoza	$ 82,183.04	157	376	2.39	$ 523.46

(EX 23, p. 10, 22, 32, 43, 52).

All of the above employees have a similar seniority rating. (EX 23. p. 60). A review of Claimant's wage records indicate that he worked thirty-nine out of a possible eighty-one days, for an average of 3.37 work days per week, which is much higher than the 2.47 day average for the five sample employees with similar seniority.

In *Hays v. P&M Crane Co*., 23 BRBS 389, 393 (1990), *vac'd and remanded*, 930 F.2d 424 (5th Cir. 1991), the Board held that an ALJ correctly determined an employees average annual wages by relying on periods of work and non-work experienced by co-workers in the preceding year. Hays had worked for P & M Crane less than 14 days prior to his injury, and finding Section 10(a) inappropriate, and not finding any similar employee for a Section 10(b) calculation, the ALJ resolved the problem by using the total number of hours worked by two of Hayes' co-workers in the preceding year and multiplying that number by Hayes' wages at the time of the accident. *P & M Crane v. Hayes*, 930 F.2d at n.2. Because the Fifth Circuit remanded the case back to the Board, the Fifth Circuit left the ALJ's wage rate determination untouched. *Id*.

Following *Hayes*, I find that adjusting Claimant's average weekly earnings to reflect the mean number of days worked by similar co-workers allows for a determination of a more appropriate average weekly wage of $346.61.[6] Under Section 10(c), I find that this amount most accurately reflects Claimant's

[6] The actual wages of these similar employees is not a controlling factor because those wages reflect earnings between 1998 and 2001, all subsequent to Claimant's injury. The number of days

wage earning capacity at the time of his injury. Thus, Claimant is entitled to a corresponding compensation rate of $231.07 per week.

C. Reasonableness and Necessity of Medical Treatment

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

The presumptions of Section 20 apply in a determination of the necessity and the reasonableness of medical treatment. 33 U.S.C. § 920 (2001)(stating that "it shall be presumed in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this chapter. . . ."); *Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir. 1999), *cert denied*, 528 U.S. 809, 120 S. Ct. 40, 145 L. Ed. 2d 36 (1999)(finding a difference of opinion among physicians concerning treatment and deciding the issue based on the whole record); *Turner v. Chesapeake & Potomac Tel. Co.*, 16 BRBS 255, 257-58 (1984). Under the Administrative Procedures Act, however, a claimant has the ultimate burden of persuasion by a preponderance of the evidence. *Greenwich Collieries*, 512 U.S. at 281. The Section 20 presumptions were left untouched by *Greenwich Collieries*. *Id* at 280. Accordingly, once a claimant has established a *prima facie* case that medical treatment is reasonable and necessary, the employer must produce contrary evidence, and if that evidence is sufficiently substantial, the presumption dissolves and claimant is left with the ultimate burden of persuasion. *American Grain Trimmers, Inc. v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999). Thus, the burden that shifts to the employer is the burden of production only. *Id*. at 817.

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worked over a 157 week period is instructive, however, because that time span provides a more accurate portrayal of periods of work and non-work than the eleven weeks prior to Claimant's injury.

The calculation of Claimant's average weekly wage to more accurately reflect periods of work and non-work is determined by taking Claimant's average of weekly wage of $472.90 that Claimant earned during the 11.57 weeks that he was employed (not counting the day of injury). This number is divided by 3.37, reflecting the total number of days available for work in a given week between June 26, 1998, and September 15, 1998. Accordingly, Claimant's average daily wage is $140.33 ($472.90 divided by 3.37).

Of the 157 total weeks covered in Employer's five similarly situated employees, the mean work days per week is 2.47 days. Multiplying Claimant's average daily wage by the mean number of days worked during Employer's 157 week sampling, Claimant is entitled to an average weekly wage of $346.61 ($140.33 x 2.47).

(1) Establishing a Prima Facie Case of Reasonableness and Necessity

A claimant establishes a *prima facie* case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Pirozzi v. Todd Shipyards Corp.*, 21 BRBS 294, 296 (1988). Here, Dr. Collins, a pain management specialist, recommended that Claimant undergo a trial evaluation of an intrathecal pump which could possibly reduce his dependence on pain medication and provide him with a more active lifestyle. (EX 8, p. 15). Thus, one of Claimant's treating physicians recommended a specific procedure for recovery from a workplace accident and Claimant was willing to undertake that treatment, which establishes a *prima facie* case that the treatment is both reasonable and necessary.

(2) Rebuttal of the Presumption

Once a claimant establishes a *prima facie* case, the employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). The Fifth Circuit uses a substantial evidence test in determining if an employer presented sufficient evidence to overcome a Section 20 presumption. *See Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999)(stating that "[o]nce the presumption in Section [20] is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related.")(citing, *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995)); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990); *Smith v. Sealand Terminal*, 14 BRBS 844 (1982). The Fifth Circuit further elaborated on the substantial evidence test in the context of causation:

> . . . [T]he employer [is] required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption--the kind of evidence a reasonable mind might accept as adequate to support a conclusion-- only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

Noble Drilling v. Drake, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also*, *Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard).

Here, Employer has presented substantial evidence that Claimant's proposed medical treatment is neither reasonable nor necessary. Dr. Kaldis, an orthopedic surgeon, stated that an intrathecal pump is a severe method to get pain under control and after considering Claimant's non-compliance with pain management, and his apparent ability to function on a daily basis without noticeable pain the use of an intrathecal pump, Dr. Kaldis stated that he would not recommend the procedure for Claimant. (EX 25 p. 27-30). Accordingly, Employer presented substantial evidence to show that Claimant's proposed medical treatment was neither reasonable nor necessary.

(3) Reasonable and Necessary Based on the Record as a Whole

Once the employer offers sufficient evidence to rebut the Section 20 presumption, the claimant must establish entitlement to the medical procedure based on the record as a whole. *See Noble Drilling Co. v. Drake*, 795 F.2d 478, 481 (5th Cir. 1981). If, based on the record, the evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281. The opinion of a treating physician is entitled to special weight. *Brown v. National Steel & Shipbuilding Co.*, 34 BRBS 195, 201 n.6(2001); *Cf. Consolidation Coal Co. v. Director, OWCP*, 54 F.3d 434, 438 (7th Cir. 1995)(disparaging a "mechanical determination" favoring a treating physician when the evidence is equally weighted). An ALJ may credit the report of a treating physician over others as long as there is substantial evidence in the record to support such a conclusion. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222, 225 (5th Cir. 2001).

In regards to the use of an intrathecal pump, Dr. Kushwaha stated that he was not the best person to make an informed judgment on its use and that is why he referred Claimant of Dr. Collins who was a pain management specialist. (CX 4, p. 37). Dr. Collins, however, made the recommendation for use of an intrathecal pump after Claimant related the following symptoms:

> Since the accident he reports pain in the bilateral shoulders, the left wrist, the left upper and mid back, the bilateral lower back. the bilateral hips and buttocks, the bilateral knees, and the bilateral ankles. He describes his pain as constant, electrical, prickly, stabbing, throbbing, burning, shooting, sharp, and aching. He also reports numbness, weakness, increased sensitivity of the skin in the back, burning sensations, increased sweating, and muscle spasms. Since the injury he reports a loss of sensation in the toes. He reports almost all types of movements as increasing his pain in the back and legs. He reports pain in his head, neck and upper extremities as being increased with pushing, pulling, lying on his back, stomach, and side, arising from a sitting or lying position and standing. Stress, cold weather, and damp weather also increase his pain. His pain is its worst in the morning before getting out of bed but he also reports the pain as having no relation to the time of day. He has been able to decrease his pain with relaxing, with sitting, with lying mostly on his right side, with taking medications and with using heat and cold packs. He is currently taking Vicodin which he reports does not help and Soma which does not help for very long. His pain interrupts his sleep, he reports around twenty times each night. His pain restricts his activities on the job, his housework, his social activities, and his sexual activities. . . . He has had physical therapy which he does not report as helpful and a TENS treatment which he does not find helpful.

(EX 8, p. 12).

Based on these subjective reports of pain, Dr. Collins recommended the use of an intrathecal pump. *Id*. at 13. Dr. Collins made this recommendation lacking information from Red Oak and without having

viewed the surveillance video depicting Claimant undertaking everyday chores without noticeable pain. Similarly, Claimant stated that Vicodin did not help his pain, yet Claimant testified that he took six to ten Vicodin a day to control his pain levels. Claimant's reports of bilateral hip, buttock and ankle pain are not substantiated by Dr. Kushwaha, who found no knee problems, or Dr. Kaldis, who found no lower extremity tenderness. (CX 4, p. 47; EX 25, p. 25-27). While Dr. Collins found an inability to heel-toe walk, that finding is contradicted by both Dr. Kushwaha and Dr. Kaldis. (CX 4, p. 48; EX 25, p. 25-27). Accordingly, as Dr. Collins' recommendation for an intrathecal pump is based on misinformation related by Claimant, and Claimant has not complied with pain management treatment, and the use of an intrathecal pump is a last resort to pain management, I find that Claimant's entitlement to this procedure, at this time, is neither reasonable nor necessary.

D. Nature and Extent and Date of Maximum Medical Improvement.

Claimant seeks continuing temporary total disability benefits from September 16, 1998, and associated medical benefits. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

(1) Nature of Claimant's Injury

On September 16, 1998, Claimant fell approximately thirty to forty feet and was diagnosed as having significant fractures in the dorsal lumbar junction of T11 and L1. (CX 4, p. 6; EX 9, p. 13).

Conservative treatment with a brace was unsuccessful and its use furthered the deformity of the dorsal lumbar junction. (EX 9, p. 13). Dr. Kushwaha, performed a fusion from T9 to L2 without any complications, and prescribed the prescription opiate Viocdin for pain. *Id*. Claimant showed improvement with subsequent pain management and physical therapy, (EX 10; EX 13), but continued reports of pain led Dr. Kushwaha to remove the instrumentation from Claimant's back in September 1999. (CX 4, p.9; EX 9. p. 186, 217). By October 14, 1999, Claimant stated that he felt better, a x-ray showed that his spine was stable, and Dr. Kushwaha sent him to therapy to help strengthen his back. (EX 10, p. 9).

Claimant underwent physical therapy again from February 24, 2000, to March 28, 2000, some five months after his surgery, with TIRR Rehabilitation Centers - Pasadena , for a total of ten visits and four cancellations. (EX 10, p. 27). TIRR discontinued therapy because Claimant was not making any progress towards his goals. *Id*. On March 6, 2000, Claimant underwent an independent medical evaluation with Dr. Bruce Weiner. (EX 13, p. 7). Dr. Weiner reported that Claimant's pain was out of proportion with the procedures that were performed on him and recommended a repeat MRI to see if there was any residual compression in the spinal canal. (EX 13, p. 8).

By March 29, 2000, Claimant reported that his condition was deteriorating, (EX 10, p. 10), but an MRI of his thoracic spine on May 18, 2000, showed no disc herniation or spinal cord nerve impingement. (EX 10, p. 11 & 32-34). Dr. Kushwaha recommended further pain management. (EX 10, p. 11). On June 27, 2000, Dr. Heidi Collins, a pain consultant, noted that Claimant reported a constant, electrical, prickly, stabbing, throbbing, shooting, and aching pain in the shoulders, left wrist, upper, mid, and lower back, hips, buttocks, knees and ankles, along with numbness, weakness, sensitivity, burning, and sweating sensations with muscle spasms. (EX 8, p. 12). Claimant further reported that the pain interrupts his sleep about twenty times per night, and restricts his job, housework, social, recreational and sexual activities. *Id*. Dr. Collins diagnosed low back and lower extremity pain, severe muscle spasms, and depression secondary to his back surgery. *Id*. at 13. On a follow-up visit on July 14, 2000, Claimant reported that his pain level was a "5-6," and indicated that he would like to undergo evaluation for the use of an intrathecal pump, which could decrease his reliance on pain medication and provide him with a more active lifestyle. *Id*. at 15.

Dr. Kaldis issued an evaluation of Claimant on July 19, 2000. (EX 7, p. 1). Dr. Kaldis noted that Claimant had not responded well to physical therapy, but a physical exam revealed that Claimant could heel-toe walk within normal limits. *Id*. at 1-3. An MRI indicated that Claimant suffered from post-traumatic kyphosis at the level of his fractures, but no evidence suggested disc herniation or neurologic deficit. *Id*. at 3, 8. Dr. Kaldis opined that Claimant had appropriate care and extensive post-operative rehabilitation and had reached MMI. *Id*. at 8.

Dr. Kushwaha reached the same conclusion concerning MMI, independently, in his deposition testimony relating the date of MMI as August 11, 2000, when he reviewed a new MRI that did not show any further issues with the spine other than his old injury. (EX 6, p. 46)(referencing CX 10, p. 12). In reaching this conclusion, Dr. Kushwaha concluded that there was no lingering neurological deficit, disc

herniation at any level, radiculopathy, organic dysfunction of the shoulders, dysfunction in the lumbosacral area, knee orthopedic dysfunction or cervical nerve compression. (EX 6, p. 47-48). No organic deficit would prevent Claimant from heel-toe walking normally. *Id*. at 48.

Subsequently, Claimant underwent pain management therapy at Red Oak Pain Management Center (Red Oak) beginning on May 30, 2001. (EX 10A, p. 1; EX 16, p. 3). There Claimant stated that his back pain is low in the morning but that it steadily increases in intensity as the day goes on. (EX 16, p. 4). Claimant was not happy with the treatment he received form Red Oak, however, and he called Dr. Kushwaha on July 18, 2001, to ask him if he would continue Claimant's prescriptions. *Id*. Claimant had asked Dr. Kushwaha to provide him with sixty Vicodin and twenty-one Soma a week, but, a phone call to Red Oak revealed that Claimant was only receiving twenty-eight Vicodin a week and not sixty. *Id*. Dr. Kushwaha opined that Claimant was not ready to take a reduction in the medication that he had been taking for the past three years and that was why he wanted to terminate his treatment at Red Oak. (CX 4, p. 12).

Thus, the nature of Claimant's injury is a five level fusion with the instrumentation that was removed a year later. As a result of his injury, Claimant consumes a large amount of prescription opiates, experiences various symptoms including numbness and pain, and suffers a restriction of his former physical capabilities. Nothing more can be done for Claimant from a surgical standpoint, and pain management was unsuccessful in relieving Claimant's pain, in part because of Claimant's failure to fully comply with his recovery program. On July 19, 2000, Dr. Kaldis opined that Claimant had reached MMI, (EX 7, p. 3), and this conclusion was reiterated by Dr. Kushwaha in his deposition when he indicated that Claimant reached MMI on August 11, 2000. Both doctors reached this conclusion after reviewing the same MRI originally ordered by Dr. Weiner. (EX 13, p 8; EX 10, p. 12). Thus, the only remaining option for Claimant is to undergo further pain management, and as a last resort, have an intrathecal pump inserted into his back, however, based on the record and Claimant's past failures at pain management and physical therapy, such treatments would not likely improve Claimant's condition. Therefore, I find that Claimant's condition had stabilized and that Claimant reached MMI by July 19, 2000.

(2) Extent of Claimant's Disability

In regards to Claimant's physical capabilities, Dr. Kushwaha stated that lifting would not likely destabilize Claimant's spine, but stated that it was not a good idea to engage in repetitive bending and lifting over twenty pounds. (CX 4, p. 13-14). Accordingly, Claimant's job as a longshoreman was not an appropriate vocation. *Id*. at 14. Although not totally disabled, Dr. Kushwaha stated that Claimant does require pain medication that prevents him from concentrating. *Id*. at 14. Dr. Kushwaha did state, however, that he would approve Claimant to do sedentary work[7] if Claimant could reduce his amount of pain

[7] Sedentary Work is defined as: "Exerting up to 10 pounds of force occasionally (Occasionally: activity or condition exists up to 1/3 of the time) and/or a negligible amount of force frequently (Frequently: activity or condition exists from 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise

medication. *Id*.

After viewing Employers videotape surveillance highlights (EX 24), Dr. Kushwaha stated that Claimants kyphosis was visible, but that Claimant had gotten in a little better shape by losing some weight. *Id*. at 28, 31-32. In response to Claimant's activities in carrying groceries, loading an amplifier into his car, bending over to the ground, wheeling an air compressor and throwing scraps of lumber, without visible signs of pain, Dr. Kushwaha stated that such activities were not surprising and were consistent with Claimant's physical limitations. *Id*. at 32 & 36. Dr. Kushwaha opined that the activities depicted on the video were less strenuous than Claimant's job on the waterfront, which he envisioned as consisting of more repetitive bending and heavy lifting. *Id*. at 33. Further, Dr. Kushwaha stated that he thought Claimant

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move objects, including the human body. Sedentary work involves sitting most of the time, but may involve walking or standing for brief periods of time. Jobs are sedentary if walking and standing are required only occasionally and all other sedentary criteria are met." DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991).

Light Work is defined as: "Exerting up to 20 pounds of force occasionally, and/or up to 10 pounds of force frequently, and/or a negligible amount of force constantly (Constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for Sedentary Work. Even though the weight lifted may be only a negligible amount, a job should be rated Light Work: (1) when it requires walking or standing to a significant degree; or (2) when it requires sitting most of the time but entails pushing and/or pulling of arm or leg controls; and/or (3) when the job requires working at a production rate pace entailing the constant pushing and/or pulling of materials even though the weight of those materials is negligible. NOTE: The constant stress and strain of maintaining a production rate pace, especially in an industrial setting, can be and is physically demanding of a worker even though the amount of force exerted is negligible." *Id*.

Medium Work is defined as: "Exerting 20 to 50 pounds of force occasionally, and/or 10 to 25 pounds of force frequently, and/or greater than negligible up to 10 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Light Work." *Id*.

Heavy Work is defined as: "Exerting 50 to 100 pounds of force occasionally, and/or 25 to 50 pounds of force frequently, and/or 10 to 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Medium Work." *Id*.

Very Heavy Work is defined as: "Exerting in excess of 100 pounds of force occasionally, and/or in excess of 50 pounds of force frequently, and/or in excess of 20 pounds of force constantly to move objects. Physical Demand requirements are in excess of those for Heavy Work" *Id*.

could lift forty or fifty pounds, but such lifting was not good for him on a repetitive basis which he defined as many times per hour, eight hours a day. *Id*. 34-35.

On March 6, 2000, Dr. Weiner issued an independent medical evaluation where he noted Claimant's reports of pain and use of a cane. (EX 13, p. 7). A physical exam, however, showed normal neurological, motor, reflex, and sensory reactions. Claimant had moderate spasms in his back, but could flex to seventy degrees and could rotate to thirty degrees in each direction. *Id*. Dr. Weiner did not feel that Claimant could ever return to heavy physical labor, but opined that Claimant could do moderate level work within a few months after some more therapy and conditioning. *Id*. Dr. Weiner also recommended that Claimant undergo a functional capacity exam to make sure no secondary gain was going on, after which a more accurate prognosis could be made about Claimant's physical capabilities. *Id*.

Dr. Kaldis issued an independent medical evaluation of Claimant on July 14, 2000, where he noted Claimant's pain was aggravated by lifting, bending, stooping, standing, walking, sitting, climbing stairs, sneezing, and riding in a automobile. (EX 7, p. 1). Dr. Kaldis also noted that Claimant had not responded well to physical therapy. *Id*. A physical exam, however, revealed that Claimant could heel-toe walk within normal limits. *Id*. at 3. Assigning a whole person impairment rating of sixteen percent to Claimant, Dr. Kaldis did not see any reason why Claimant could not return to full duty without work restrictions. *Id*. In his post-hearing deposition, however, Dr. Kaldis recanted his position concerning the extent of Claimant's injury, and stated that Claimant should not climb ladders, and should stay away from moving objects because his use of prescription opiates affects his judgment and reflexes. (EX 25, p. 20-21, 24-25).

Thus, Dr. Weiner recommended that Claimant could perform moderate work (EX 13, p. 7), and Dr. Kaldis approved Claimant for work that did not entail climbing or working around moving objects. (EX 25, p. 24-25). Claimant's treating physician, Dr. Kushwaha, did not approve Claimant for any type of work, but did state that the video surveillance depicted activities consistent with Claimant's physical capabilities. (EX 4, p. 32 & 36). Mr. Stanfill, a vocational expert testified that Dr. Kushwaha's deposition could be interpreted to approve medium level work, and Mr. Stanfill stated that the activities depicted on the video surveillance demonstrated exertion falling into the light work category and approached the medium work category. (Tr. 131). I also note the Ms. Ferris, Claimant's earlier vocational counselor, was considering jobs in the light to medium range. (Tr. 134; EX 15, p. 2-5).

Based on the above medical reports, I find that Claimant is capable of medium level work. I find that Dr. Weiner's opinion that Claimant can perform Medium Work is credible because Claimant's demonstrated ability to move ten to twenty-five pounds frequently in the video surveillance, which, as Mr. Stanfill testified, demonstrated Claimant exerting force "equal to, if not exceeding, light jobs, and more closely approaching medium." (Tr. 131). Furthermore, Dr. Kushwaha stated that claimant could carry forty to fifty pounds, but restricted that statement by saying that Claimant should not be lifting forty to fifty pounds on a repetitive basis. (EX 4, p. 35). By definition, medium work only requires occasional lifting of twenty to fifty pounds, and exerting ten to twenty-five pounds of force frequently. DICTIONARY OF OCCUPATIONAL TITLES Appendix C (4th ed. 1991). Dr. Kaldis' deposition does not reflect on the level

of work Claimant could perform, but merely limited the conditions of employment to those jobs that did not require climbing ladders or working around moving objects. Accordingly, I find that Claimant is capable of medium work as defined by the Dictionary of Occupational Titles.[8]

E. Prima Facie Case of Total Disability and Suitable Alternative Employment

(1) Prima Facie Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a prima facie case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Employer conceded that, because of Claimant's use of prescription opiates, Claimant cannot return to his former job as a longshoreman.

(2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings

[8] As noted *supra*, I do not find Claimant to be a credible witness, thus his reports of extreme pain, by itself, cannot establish the extent of his disability.

established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is the capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

Based on a determination that Claimant could do work requiring a medium level of exertion, on August 4, 2001, Mr.Stanfill identified several job categories that were appropriate for Claimant considering his age, background, etc., including: Shipping/Receiving Clerk, Tool Crib Attendant, Inventory Clerk, Groundskeeper, Cleaner, Mail Clerk, and Assembler, paying between $7.03 and $10.01 per hour. (EX 20. p. 7).

Mr. Stanfill then identified actual jobs openings within his defined job categories, in the Houston area that were willing to interview and consider Claimant for employment. (EX 20, p. 8). Mr. Stanfill identified the following jobs:

Asphalt Raker/Helper	$9.00 per hour
Plumber's Helper	$8.00 per hour
Spray Painter Helper	$9.50 per hour
Electrician Helper	$9.00 per hour
Construction Helper	$9.00 per hour
Alternator/Generator Rebuilder	$8.00 per hour
Ceiling Fan Assembler	$6.50 per hour
Machine Operator	$7.00 per hour
Plastics Production Worker	$7.00 per hour
Parts Clerk	$7.50 per hour
High Rise Cleaner	$8.00 per hour
Apartment Maker Ready Worker	$8.00 per hour

(EX 20, p. 8).

Claimant has not shown diligence is seeking any of the jobs identified and failed to meet his complimentary burden of showing that the identified jobs are not available or are not suitable for him. Furthermore, Claimant has not shown that any of the jobs entail working around moving objects according to the restrictions to his activities set by Dr. Kaldis. Accordingly, based on Mr. Stanfill's vocational records,[9] I find that Employer established suitable alternative employment on October 4, 2001 paying $8.04 per hour,[10] or $321.60 for a forty hour work week. Taking into consideration increases in the national average weekly wage between September 16, 1998, the date of the accident, and October 4, 2001, the date Employer proved suitable alternative employment, $321.60 dollars per week in 2001 is the equivalent of $271.37 in 1998.[11] Thus, as Claimant's average weekly wage at the time of the accident was

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[9] I note that the record contains vocational reports from Ms. Ferris, who, On September 11, 2000, on behalf of the Department of Labor, established appropriate jobs for Claimant such as: floor covering estimator, customer service representative, sales representative, shuttle driver, delivery driver, and gate attendant. (EX 15, p. 2-5). I note that as identified by Mr. Stanfill, these jobs fall within the appropriate restrictions as set by Dr. Kushwaha. Given the deposition testimony of Dr. Kaldis, however, I find that delivery type jobs are not appropriate for Claimant considering his use of prescription opiates and the fact that such jobs require the operation of heavy machinery. While Ms. Ferris did not provide a pay range for the available jobs, she did identify an appropriate specific position of a cashier/gate attendant paying six dollars an hour. As this job pays slightly higher than the minimum wage, and generally every worker has the necessary skills to perform the job, I find that only properly identifying a single job of this nature under *Turner*, fails to establish suitable alternative employment. *See P & M Crane v. Hayes*, 930 F.2d 424 (1991)(stating that a single opening can establish suitable alternative employment when the employee is highly skilled, the job is specialized and the number of workers with suitable qualifications is small). Thus, Employer did not establish an earlier onset date for showing suitable alternative employment through the records of Ms. Ferris.

[10] In determining a claimant's earning capacity for suitable alternative employment, the Board has indicated that it is proper to take an average pay of all the jobs reasonably available. Louisiana Insur. Guar. Ass'n v. Abbott, 29 BRBS 22 (CRT) (5th Cir.1994)(finding that averaging salary figures to establish earning capacity is appropriate and reasonable).

[11] Claimant was injured on September 16, 1998. The national average weekly wage from October 1, 1997 to September 30, 1998 was $417.79. Employer demonstrated suitable alternative employment on October 4, 2001. The national average weekly wage from October 1, 2001 to September 30, 2002 is $483.04, reflecting an increase of $65.25, or 15.62% from 1998. ($417.79(x)

$346.61, and his post-injury earning capacity is $271.37, Claimant is entitled to permanent partial disability benefits, pursuant to Section 8(c)(21), of $50.16 per week.[12]

(3) Claimant's Voluntary Employment - Suitable Alternative Employment and Credit for Wages Earned

Employer asserts that it is entitled to a credit of $5,580.00 against any compensation owed by it for Claimant's job in December 2000 repossessing cars and for four months of employment as a painter's helper prior to the hearing. Employer does not cite any authority for this proposition of law. The Act does contain specific offset and credit provisions which prevent employees from receiving a double recovery for the same injury, disability or death. *See* 33 U.S.C. §§§ 903(e), 914(j), 933(f) (2001). In addition, an independent credit doctrine exists in case law which provides employer with a credit for prior disability payments under certain circumstances to avoid a double recovery of compensation for the same disability. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir.1986); *Adams v. Parr Richmond Terminal Co.*, 2 BRBS 303 (1975). The Act does not contain any specific credit provision[13] entitling an employer

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= $65.25). Employer established suitable alternative employment at $321.60 per week On October 4, 2001, and discounting that amount by 15.62% results in 1998 earnings of $271.37. *See Table of Compensation Rates as of October 1, 2001*, LONGSHORE NEWSLETTER AND CHRONICLE OF MARITIME INJURY LAW, vol XIX, No. 7, Oct. 2001.

[12] Section 8(c)(21) provides:

> Other cases: In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability.

33 U.S.C. § 908(c)(21) (2001).

Thus, as Claimant's pre-injury weekly wage was $346.61, and his post-injury earning capacity is $271.24, that reflects a difference of $75.24. Two-thirds of $75.24 is $50.16.

[13] Related to the credit provisions under the Act and voluntary employment by a claimant is Section 8(j), which permits an employer to request a claimant to report his post-injury earnings against the penalty of forfeiture of compensation for under-reporting or failing to report. 33 U.S.C. § 908(j) (2001). To invoke that provision, however, the employer must first require that the former employee file such a report. 33 U.S.C. § 908(j)(1-2) (2001); *Hundley v. Newport News Shipbuilding and Dry Dock Co.*, 1998 WL 850137, *5 (DOL BenRev. Bd. 1998)(stating that both the Senate bill and the House amendment to Section 8(j) contemplated that employers would have authority "to require employees receiving compensation to submit a statement of earnings not more frequently than semi-

to offset sums a claimant earned from another employer. *Carter v. General Elevator Co.*, 14 BRBS 90, 98 n.1 (1981). Rather, instead of awarding a credit, "the proper procedure is for the administrative law judge to award temporary total disability benefits from the time claimant did not work, punctuated by temporary partial awards for the time claimant was engaged in part-time employment." *Id*. at 98; *Turk v. Eastern Shore Railroad*, 33 BRBS 468 (1999)(ALJ)(same).

"An award of total disability while a claimant is working is the exception and not the rule." *Carter*. 14 BRBS at 97. *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, claimants working in pain or in sheltered employment may still receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979)(extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974)(beneficent employer). Also, the employer bears the burden of showing suitable alternative employment after the claimant establishes a *prima facie* case of total disability. *Turner*, 661 F.2d at 1042-43; *Carter*, 14 BRBS at 97. Therefore, for an employer to take advantage of the *Carter* rule, a claimant's voluntary employment must be such that it does not constitute sheltered employment or extraordinary effort, and must be suitable alternative employment as established by the employer.

Here, Claimant towed vehicles at "Cars R Us" beginning in December 2000 for a total of two and one-half months earning cash wages between $1,300.00 and $1,400.00 dollars. (Tr. 58-59). Claimant testified that he was unable to effectively perform this job because the driving, bouncing and sitting in the truck aggravated his back, and he could not tolerate driving all night without being able to get up and move around. *Id*. Apart from Claimant's testimony that he was "working in pain," Employer failed to demonstrate that this job constituted suitable alternative employment. Dr. Kaldis testified in his deposition that Claimant should not work around moving objects because Claimant's use of prescription opiates affected his judgment and reflexes making him a liability to himself and others. (EX 25, p. 24-25). Accordingly this job did not constitute suitable alternative employment and Employer is not entitled to a Section 8(e) decrease in compensation to reflect a post-injury earning capacity.

Three or four months prior to the hearing, Claimant obtained a job as a painter's helper earning eight dollars an hour. (Tr. 47, 61-62). This job involved remodeling houses, making measurements and putting in tile floors. (Tr. 47). Claimant testified that the work did not worsen his physical situation because he did not do physical work, did not carry or tote anything over five to ten pounds, and did not have to bend down to pick up anything. (Tr. 47; EX 6, p. 19-20). Also, a "painter's helper" job is similar to others identified by Mr. Stanfill as suitable alternative employment considering Claimant's physical limitations. (EX 20, p. 8)(finding specific jobs such as a plumber's helper, construction helper, and an

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annually."). Here, the Employer never submitted to Claimant an LS-200, Report of Earnings Form, to invoke the forfeiture provisions of Section 8(j).

electrician's helper as suitable employment for Claimant). Mr. Stanfill also testified, however, that he would not recommend that Claimant take this particular job as a painter's helper because it did not offer stability, a health care package, and it paid wages on a cash basis. (Tr. 120). Thus, by the testimony of Employer's own vocational expert, Claimant's job did not constitute suitable alternative employment and Employer is not entitled to a Section 8(e) decrease in compensation payments for the period that Claimant held this job.

F. Conclusion

I find that Claimant did not make a credible witness because he exaggerated the extent of his injuries, thus, I accord his subjective complaints concerning his impairments to less weight. I also find that because Dr. Kaldis has ties to the insurance industry in violation of 33 U.S.C. 907(i) (2001), his report is entitled to less weight than ordinarily given to an "independent medical examiner." Under Section 10(c), Claimant's average weekly wage at the time of his injury was $346.61, with a corresponding compensation rate of $231.07 per week. Claimant failed to establish that further medical treatment, for the use of an intrathecal pump, was reasonable and necessary at the present time because the physician making that recommendation did so based off an incomplete record and Claimant's misrepresentations concerning his condition. Claimant reached maximum medical improvement on July 19, 2000, when Dr. Kaldis determined that there was nothing more to do for Claimant from a surgical standpoint and Claimant's residual injury was permanent in nature. After reaching maximum medical improvement, Claimant was capable of medium level work, but could not return to his former longshore employment, or be around moving objects because of his use of prescription opiates which affect his judgment and reflexes. Employer demonstrated suitable alternative employment on October 4, 2001, earning $8.04 per hour, but Employer is not entitled to a credit or a reduction in disability payments for Claimant's voluntary employment because that employment was not shown to be suitable. After Employer demonstrated suitable alternative employment, Claimant is entitled to a temporary partial disability award of $50.16 per week.

G. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills..." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984). This order incorporates by

reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

H. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from September 16, 1998 to October 4, 2001 based on an average weekly wage of $346.61 per week and a corresponding compensation rate of $231.07.

2. Employer shall pay to Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the act based on two-thirds of the difference between Claimant's pre-injury wage earning capacity of $346.61, and his post-injury earning capacity of $271.37, or $50.16 per week from October 5, 2001 and continuing

3. Employer shall be entitled to a credit for all compensation paid to Claimant after September 16, 1998, amounting to $19,624.75

4. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, but is not responsible for Dr. Collins' recommendation for insertion of an intrathecal pump.

5. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S. Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge